

overall revision of our study

7 March 1958

MEMORANDUM FOR THE RECORD

SUBJECT: Executive Privilege

1. A Court of Claims opinion by Justice Reed (Retired) in Kaiser Aluminum and Chemical Corporation v United States (#102-54, decided 15 January 1958) may be of use to this Agency in determining what sort of information is safe from disclosure in court cases. While the Kaiser case was based on contract, Justice Reed's opinion touches on criminal cases as well as the privilege of the Executive Department vis-a-vis Congress which he said "is a judicially undecided issue."

2. Of particular interest is that executive privilege may extend to those intra-office communications including summaries of an assistant's research which the head of an agency must rely upon for aid in determining a course of action.

3. Another point in the opinion emphasizes that in many cases the head of an agency probably is much better qualified to determine what is a privileged document than judges or commissioners even though they, as a group, have an objective approach and are conscientious of the necessity for preservation of privacy.

4. According to the Justice Department attorney, who handled the case, this ruling on the motion as yet has not been appealed by the plaintiff and probably will not be.

5. A brief of the Kaiser case follows:

On defendant's motion for reconsideration of a Court of Claims order requiring production of certain documents in the possession of the General Service Administration, the Court of Claims held that the Government's claim of privilege was well founded and that the head of a government agency can determine the privilege for himself.

The document sought by Kaiser was allegedly necessary "to enable Kaiser to state with appropriate particularity the precise scope of its claim" in a suit seeking damages and contract reformation for sale to Kaiser of three manufacturing plants.

The Government took the position that the Court of Claims should not review the claim of privilege asserted by a witness or an agency

head by requiring the witness to testify or the agency head to produce documents, so that the court may itself reach a conclusion as to whether or not such information should be disclosed without risk to the public interest.

The Government in response to an order of the Court of Claims declined to produce the document and filed a motion for reconsideration.

Justice Reed's opinion, 4 judges concurring, points out that the document in question was an advisory opinion on intra-office policy and covered by the term "executive privilege."

This type of privilege is granted by custom or statute for the benefit of the public, not of executives who may happen to then hold office. Privilege against discovery of information in the hands of the Government may not always be extended. The document sought by plaintiff in this case concerned "intra-office advice on policy, the kind that a banker gets from economists and accountants on a borrower corporation, and in the Federal Government the kind that every head of an agency or department must rely upon for aid in determining a course of action or as a summary of an assistant's research." Even where the Government submits itself to suit, it must retain privileges for the public good so that free and open comments on the advantages and disadvantages of a proposed course of "governmental management" can be maintained. It is necessary to look into the circumstances around the demand for a document in order to determine whether its production would be injurious to the consultive functions of government which are protected by the privilege of non-disclosure.

Even though the executive privilege for intra-departmental advice rarely has "the importance of diplomacy or secrecy", the public interest requires that the "officer and agency most aware of the needs of government and most cognizant with the circumstances surrounding the legal claim" should not yield to a judicial examination and determination of privilege unless the circumstances indicate a "much more definite showing of necessity than appears" in this case.



Office of General Counsel

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OGC:MCM:jem

✓ Subject - *Sec. 3*
Signer
Chrono

5 March 1958

MEMORANDUM FOR THE DIRECTOR:

1. This memorandum is for information only:

2. Jack Raymond, NEW YORK TIMES, telephoned to me at 11:25 a.m. today to ask if he could stop in at about 11:45 a.m. He arrived at noon. He said he had a story in the TIMES of 31 January which stated that the Russians were having a count-down which indicated they were preparing to launch a huge rocket, probably to lift Sputnik III.

3. He wanted to know if he could secure on a non-attributable basis, whether such a rocket had failed. I asked him to dictate his question to a stenographer so I would know precisely what he wanted. He dictated this:

"I just want to know if we have reports within recent weeks of Soviet efforts to launch either a satellite or a large ballistic missile that failed?"

4. I told Jack that CIA does not give intelligence to the Press and that anything regarding nuclear bombs or rockets would be the kind of thing that AEC might be the Agency to ask for information.

5. He said that AEC announces firing of hydrogen and atomic weapons by the Soviet but neither it nor any other Government agency announces failures of rockets that are to power earth satellites. He thought, he said, such announcements should be made. I told him that, of course, CIA is not the Agency to do that -- Defense or State or AEC perhaps but not CIA; we furnish intelligence to Government agencies but not to the public.

6. I suggested that Jack get his information from the source of his original story. I told him when I read it I noted that he did not give a source so I assumed someone in the Defense Department might be his source since he is exclusively on that beat.

"The story came from more than one source," he told me. He added that he

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cannot go to that source now, "because he is out of the city." He went on to say, "we, (the TIMES) got word of this and I was able to verify it."

7. Raymond further said that the only verifiable information he had in the 31 January story was that a count-down had begun. He had no information that it ever ended. He has been told there was a firing that failed but he cannot use this because the source may not be reliable; he, Raymond, has a reputation to uphold and that's why he came to CIA. Would Mr. Dulles, on a non-attributable basis, say that there had been a failure in this instance.

8. I phoned Mr. Dulles who would not comment and who repeated our policy.

9. Raymond also told me he was a guest at the Soviet Embassy two weeks ago. He said he asked a Russian official, while he was there, if the Soviet had ever finished the count-down. The official shrugged his shoulders and said, "what count-down?" Raymond asked, "didn't you read my story, I had a count-down." The Russian said, "that was your story."

10. Mr. Raymond said that on 31 January the ASSOCIATED PRESS in its afternoon story had gone further than he had because the AP stated that there had been a failure. I told him John Scali's story also said he had information re this alleged firing from an "intelligence source" and I wanted Raymond to know that Scali and thirteen others had phoned here re Raymond's story and all got the same reply, CIA would not discuss the report.

11. Raymond left, satisfied, but asking that should Mr. Dulles decide later to tell him "yes, there was a failure," or "no, there was not a failure" he would be indebted, and would protect the source.

SIGNED

STANLEY J. GROGAN
Assistant to the Director

cc: DDCI
Dir/Sec
IG
✓ Gen. Counsel